LeMond Cycling, Inc. v. Trek Bicycle Corporation Doc. 151

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

LEMOND CYCLING, INC., Plaintiff, v. TREK BICYCLE CORPORATION, Defendant and Third-Party Plaintiff, v. GREG LEMOND, Third-Party Defendant.	Case No. 08-CV-1010 (RHK-JSM) TREK'S MEMORANDUM IN SUPPORT OF MOTION TO COMPEL ANDREU TAPE RECORDING

Trek Bicycle Corporation ("Trek") provides this memorandum in support of its motion to compel production of the secretly recorded verbatim tape recording of Betsy Andreu. LeMond recently submitted Ms. Andreu's testimony in support of his summary judgment motion. At the same time, LeMond has withheld his secretly taped phone call with Ms. Andreu under an assertion of work product privilege. The tape recording should be produced because (1) a verbatim tape recording is not work product, and (2) LeMond has waived any assertion of privilege regarding the tape recording on two grounds: (a) by using Ms. Andreu as a witness in support of his recent summary judgment motion, and (b) by secret taping, which vitiates any work product protection.

Background

In 2004, Greg LeMond taped one or more phone calls with his now good friend, Betsy Andreu. LeMond has withheld the sole surviving tape from Trek during discovery on

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the basis of asserted work-product protection.[1] Although LeMond produced other tape recordings he secretly had made of his phone calls with various people (John Burke, Cindy Wagner, Bob Mionske, Stephanie McIlvain, Emma O'Reilly, Dan Thornton), he did not produce a tape of Betsy Andreu, nor did he expressly identify a tape recording of Betsy Andreu on his November 26, 2008 privilege log. (Declaration of Kristal S. Stippich (hereafter "Stippich Decl."), Exh. 1). Rather, Trek found out about the existence of a Betsy Andreu tape recording after Greg LeMond revealed in his December 15, 2008 deposition that "from 2001 on, [he] taped everybody" and admitted he had taped Ms. Andreu. (LeMond Dep. 155, 223).

In response to a meet and confer letter, LeMond's counsel informed Trek that they had withheld tape recordings of Ms. Andreu as work product and directed Trek to LCI PRIV 202-03 on their 11/26/08 log. (Stippich Decl., Exh. 2, 12/23/08 Rahne letter to

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[1] The most recent discovery request that Trek made regarding tape recordings is its May 8, 2009 Trek's Second Set of Written Discovery to LeMond Cycling, Inc. and Greg LeMond, Document Request No. 31, which provides:

> Request No. 31: Produce all documents reflecting tape-recorded conversations concerning one or more of the issues raised in the pleadings in this lawsuit that you have not already produced to Trek, including without limitation such recordings of conversations occurring subsequent to Trek's assertion of claims in this lawsuit.

LeMond responded on June 8, 2009:

> RESPONSE: Plaintiff incorporates by reference its General Objections. Plaintiff specifically objects to this Request to the extent that it calls for the production of documents or information covered by the attorney-client or work-product privileges. Plaintiff further objects to the term "all documents" as vague and ambiguous and, to the extent such term is given its broadest interpretation, Plaintiff objects that the Request is overbroad and unduly burdensome. Plaintiff also objects to this Request as duplicative of previous Requests. Subject to and without waiving Plaintiff's General and Specific Objections, Plaintiff hereby incorporates its response to Defendant's First Set of Discovery Requests, Interrogatory No. 4, found in Plaintiff's Responses to Trek's First Set of Written Discovery to LeMond Cycling, Inc., and Plaintiff's Supplemental Responses to Trek's First Set of Written Discovery to LeMond Cycling, Inc.

Weber, at 2). The description for LCI PRIV 202-03 does not mention a tape recording at all, but merely describes the document as a "record of client investigation at the direction of counsel to identify potential witnesses" and identifies "Greg LeMond" as the author. (Stippich Decl., Exh. 1). No date is provided nor are any other participants identified, not even the "witness." *Id.*

In response to Trek's December 2008 motion to compel, LeMond's counsel provided some additional information about the tape:

> The recording with Ms. Andreu was done at the request of Mr. LeMond's counsel to explore whether Ms. Andreu was willing to testify in a legal action that might occur related to the dispute involving Trek, Lance Armstrong, and Mr. LeMond. Mr. LeMond's counsel in fact participates in part of the call to confirm the content of the discussion.

(Dkt. # 77, LeMond 1/8/09 Opp. Br. at 10 n.4). Five months later in May 2009, LeMond provided a revised privilege log in which he lists Betsy Andreu and Sidney Bluming as participants in the recording and specifies that the record is a "tape," but still does not provide a date. The "date" column states: "Post-2001 involvement of L. Armstrong in Trek/LeMond contractual relationship." (Stippich Decl., Exh. 3) The log description states:

> Confidential tape of conversation between client, attorney, and potential witness made for the purpose of investigation of potential witness and at the direction of counsel reflecting attorney's thoughts, mental impressions, legal opinions, and legal advice.

Id. A date of the conversation—sometime in 2004—was given two months later in another revised privilege log in July of 2009. (Stippich Decl., Exh. 4).

In the meantime, on June 23, 2009 LeMond filed a motion for summary judgment and on July 10, 2009 filed a brief in support of that motion. In that brief LeMond relied on the testimony of Betsy Andreu (provided via an attached affidavit) to present inadmissible hearsay evidence about Lance Armstrong.

Trek moves for an order requiring production of the Andreu tape recording on the grounds that: (1) a verbatim tape recording is not work product, and (2) even if work product, LeMond waived the privilege by (a) affirmatively using Andreu's testimony in summary judgment, and (b) by secretly recording a phone conversation.

Argument

LeMond has withheld the Andreu tape on the basis of the work product doctrine. The work product doctrine protects materials prepared by an attorney in anticipation of litigation from discovery. *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). The doctrine has been codified in Fed. R. Civ. P. 26(b)(3), which provides

> (3) Trial Preparation: Materials.
>
> (A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if: (i) they are otherwise discoverable under Rule 26(b)(1); and (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.
>
> (B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

Fed. R. Civ. P. 26(b)(3). Even without a showing of substantial need and undue hardship with which to overcome the privilege, work product protection can be waived in a variety of ways where it would be unfair to maintain the privilege. *E.g*, *United States v. Nobles*, 422 U.S. 225 (1975); *Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 732 (8th Cir. 2002) ("When a party seeks a greater advantage from its control over work product than the law must provide to maintain a healthy adversary system, the privilege should give way."); *Kallas v. Carnival Corp.*, 2008 WL 2222152, *4 (S.D. Fla. 2008).

I. The Andreu Tape Is not Work Product And Should Be Produced.

Trek moves for production of the Andreu tape because verbatim tape recordings are not protected work product—but merely contain factual material to which Trek is entitled. Greg LeMond secretly taped many persons and has produced to Trek those that remain (*e.g.,* tapes of John Burke, Cindy Wagner, Bob Mionske, Stephanie McIlvain, Emma O'Reilly, Dan Thornton). He has withheld the Betsy Andreu tape (and only that tape, so far as Trek is aware although other tapes are missing or discarded).

LeMond's original description of the Andreu recording did not specify that it contained the mental impressions of his attorney but simply stated: "record of client investigation at the direction of counsel to identify potential witnesses." (Stippich Decl., Exh. 1) It was only when Trek challenged the privilege that LeMond asserted the participation of an attorney in the conversation (Dkt. # 77, LeMond 1/8/09 Opp. Br. at 10 n.4), and not until many months later in May of 2009 provided a revised privilege log asserting that attorney mental impressions and legal opinions were involved. (Stippich Decl., Exh. 3)

Any verbatim recording of the conversation between LeMond and Andreu should be produced. While notes and memoranda prepared by an attorney, or an attorney's agent, with respect to a witness interview "are opinion work product entitled to almost absolute immunity," *Baker v. General Motors Corp.*, 209 F.3d 1051, 1054 (8^{th} Cir. 2000)), verbatim, non-party witness statements "are neither privileged nor work product and must be produced." *Schipp v. General Motors Corp.*, 457 F. Supp. 2d 917, 924 (E.D. Ark. 2006) (granting motion to compel non-party witness statements); *Gray*, 2006 WL 1472748 at *2 (affirming Magistrate Judge's ruling that tape recordings between plaintiff and other employees were not work product because "[s]uch verbatim tapes" did not involve "'mental impressions, opinions, or legal theories of an attorney'—within the meaning of Rule 26(b)(3)."). *See also Dobbs v. Lamonts Apparel, Inc.*, 155 F.R.D. 650, 653 (D. Alaska 1994) (denying motion for protective order as to verbatim, third-party witness statements made in response to attorney questionnaire as part of development of case and stating "[w]hat counsel are entitled to protect is *their* work and *their* thoughts and *their* analysis of the case, not the knowledge possessed by third parties").

Trek requests the Court order disclosure of the verbatim conversation of Greg LeMond and Betsy Andreu, just as he produced the other third party nonprivileged tape recordings.

II. LeMond Waived Any Work Product Protection On Two Independent Grounds.

Even if the tape were work product, LeMond waived that protection through two independent grounds: (a) under the Supreme Court's decision in *Nobles* and its progeny, once LeMond affirmatively used Ms. Andreu's testimony in this litigation (which he now has), he must allow Trek access to her witness statement to test her credibility; and (b) to the extent that the tape recording was secretly made, LeMond has waived any privilege.

A. *Nobles* Waiver Via Using Andreu As Witness In Support of Summary Judgment Motion

A party cannot advance a claim to a court or other decision-maker while simultaneously relying on the work product doctrine to withhold from his litigation adversary a witness statement the adversary might use to effectively contest or impeach the testimony. In *United States v. Nobles*, 422 U.S. 225 (1975), the Supreme Court held that by presenting a witness's testimony, the party waives the privilege with respect to a witness statement. In *Nobles*, the defendant was on trial for robbery. Defense counsel hired an investigator to interview the two eyewitnesses to the robbery, and preserved the essence of his conversations in a written report. The defense attorney intended to call the investigator to the stand in an attempt to undermine the credibility of these witnesses who had testified for the prosecution. *Id*. at 227-28. The trial court held that a copy of the investigator's report would have to be turned over to the prosecution if the investigator was going to testify. *Id.* at 229. When defense counsel refused, the court ruled the investigator would not be allowed to testify about his interviews with the witnesses. *Id.*

The Supreme Court upheld the district court's turn-over ruling. *Id.* at 230. The Supreme Court reasoned that the report was highly relevant to the critical issue of credibility of the investigator's testimony and production would substantially enhance "the search for the truth." *Id.* at 233. Moreover, the Court concluded that even if the work product doctrine applied, it had been waived because defendant:

> sought to adduce the testimony of the investigator and contrast his recollection with that of the prosecution's witnesses. … *[B]y electing to present the investigator as a witness, [he] waived the privilege with respect to matters covered in his testimony.* [He] can[not] … advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials[.]

Id. at 239-40 (emphasis supplied). The Court also reasoned "where, as here, counsel attempts to make a testimonial use of these materials the normal rules of evidence come into play with respect to cross-examination and production of documents." *Id*. 240, n.4.

Following *Nobles*, courts have held that a party who uses testimony in support of pretrial motions also waives the work-product doctrine and must produce withheld witness statements with respect to matters covered in their testimony. For example, in *Kallas v. Carnival Corp*., 2008 WL 2222152 (S.D. Fla. 2008), plaintiff moved for certification of a class of passengers injured from a virus on board a cruise ship. In support of the numerosity and commonality elements of the motion, plaintiff filed affidavits of two agents of plaintiff's counsel who had interviewed passengers for selection as potential class members, and attached to their affidavits as exhibits some of the information obtained from the witnesses. *Id.* at *1, 5. The court granted defendant's motion to compel plaintiff to turn over the memo, questionnaires, and notes memorializing the factual information obtained by plaintiff's counsel's agents who had surveyed witnesses. *Id.* at *7.

Likewise, in *Versatile Metals, Inc. v. Union Corp*., 1987 WL 11229 (E.D. Pa. May 22, 1987), the court granted plaintiff's motion to compel holding that defendants waived any work product protection that attached to a witness statement. There, defendants filed a response brief to plaintiff's motion for summary judgment. In their response, defendants relied on the statement of a witness, John McAfee, but attached only portions of his statement instead of the full statement. *Id.* at *1. The Court reasoned the whole statement must be provided: "Defendants introduced testimony as part of its response to the summary judgment motion. Thus it is no longer protected by the work-product doctrine as outlined in *Hickman v. Taylor* and discussed in *United States v. Nobles*." *Id.* at *2. The Court relying on *Hickman*, further reasoned:

> even in the pretrial discovery area, in which the work-product rule does apply, work-product notions have been thought insufficient to prevent discovery of evidentiary and impeachment material.

Id. at *3 (citing *Hickman v. Taylor*, 329 U.S. at 511).

Here, like *Nobles*, *Kallas* and *Versatile Metals*, LeMond waived any work product that might have attached to the Andreu tape recorded statement when he relied on Ms. Andreu's testimony in support of his motion for summary judgment, submitting her sworn affidavit (and attached exhibits thereto) containing excerpts of her alleged discussion with Lance Armstrong in 2001. (*See* LeMond Summ. J. Br. at 15) (arguing that in 2004 Betsy Andreu contacted him to provide him with "disturbing information regarding Armstrong's influence on Trek" and submitting Affidavit and 7/17/04 email from Andreu to LeMond recounting some of the 2001 conversation with Lance Armstrong and providing LeMond her phone number, saying *she preferred to talk on the phone about the matter*). Trek is entitled to the entire tape recording of their phone conversation in the search for the truth, as well as for potential impeachment material.

B. Waiver Via Secret Tape Recording

Additionally, if, like the other telephone conversations, LeMond secretly taped the Andreu conversation, then this Court should find that any work product protection has been waived. A majority of courts addressing the issue have concluded that secret tapings either involving an attorney directly or done with an attorney's knowledge or acquiescence vitiates the privilege based upon ethics grounds, the purpose behind Rule 26 and/or fairness principles governing the work product doctrine. *See, e.g., Ward v. Maritz, Inc.,* 156 F.R.D. 592, 598 (D.N.J. 1994) (work product protection vitiated by attorney involvement in counseling employee to secretly tape conversation as well as principle of fairness governing work product doctrine); *Sea-Roy Corp. v. Sunbelt Equip. & Rentals, Inc.*, 172 F.R.D. 179, 184-85 (M.D.N.C. 1997) (holding Rule 26 requires recording party to inform person being recorded of that fact at time of recording in order to qualify recorded statement for work product protection); *Williams v. Gunderson Rail Servs., LLC*, 2008 WL 145251, *2 (W.D. La. Jan. 14, 2008) (granting motion to compel tapes stating "[v]irtually all cases dealing with the issue have held that clandestine recordings of conversations with potential fact witnesses, whether made by a party or counsel, before or after counsel is consulted, are not shielded under the work product doctrine."); *cf. Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F.3d 693, 699-700 (8th Cir. 2003).

CONCLUSION

For the reasons set forth above, Trek requests the Court order LeMond to produce the Andreu tape recording.

HALLELAND LEWIS NILAN & JOHNSON, P.A.

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